

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,634

WILLIE CUNNINGHAM, Appellant

v

UNITED STATES OF AMERICA, Appellee

— 823

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 9 1964

Nathan J. Paulson
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STATEMENT OF QUESTIONS PRESENTED

In the instant case no testimony or evidence was presented by the defendant, and at the conclusion of the case for the Government defendant made a motion for judgment of acquittal.

The motion was denied.

Thereafter, both sides having rested the prosecution advised the Trial Court it had in its possession a signed statement of confession; that it had permitted counsel for the defendant to read such statement; that it had not offered the statement in evidence because its admissability was doubted.

Thereupon, the Trial Court instructed the prosecutor over defense objection to have the statement marked for identification and made part of the record of the case and adjourned the Court. On the following morning the Court required the United States District Attorney to introduce the statement into evidence over the objection of the defendant and over the objection of the prosecutor.

During his efforts to compel the prosecutor to introduce the statement into evidence the Trial Court advised the prosecutor that if the statement was not introduced the Court would, *sua sponte*, enter a judgment of acquittal for the reason that absent a written statement the Government's case amounted to no more than a scintilla.

This is the same state of the case which the Court had stated the day before was sufficient to go to the Jury.

Upon receipt of the threat to dismiss the case forthwith unless the statement was introduced the District Attorney unwillingly complied with the demand of the trial Court.

The statement did not meet the test required to establish a voluntary statement in any event, and approximately one hour before the Jury returned the verdict of guilty it requested the Court to send the confession into the Jury room. The request was granted.

The questions presented by this factual situation are:

Did the Court have the right to cause the case to be reopened under the circumstances detailed, and did the Court have the power and authority to compel the District Attorney to enter the statement into evidence under threat of forthwith dismissal, and was it error for the Judge to deny a motion for judgment of acquittal when by his own evaluation of the case the Government had produced nothing more than a scintilla of evidence against the defendant?

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UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the terms of Title 29, §1291, U.S.C.

STATEMENT OF THE CASE

Below, appellant was charged with murder in the second degree.

The Jury returned a verdict of guilty of manslaughter and the appellant was sentenced to a term in a proper penal institution of 3 years and 4 months to 10 years.

This appeal does not contest the sufficiency of the evidence nor is it concerned with the admission or weight and sufficiency of any evidence presented prior to the point in the trial when both sides had rested.

After both sides had rested the Assistant United States

District Attorney advised the Court below that he had in his files a written document in the nature of a confession; that this writing had been obtained from the appellant after he was taken into custody and before he was arraigned, and that the Government had purposely not attempted to introduce this document into the case.

Counsel for the defendant advised the Court that he had been aware of the existence of this document and he had not sought to have it entered into evidence. At this stage of the case the Court had just denied appellant's motion for judgment of acquittal, and counsel for the respective parties were ready to argue the case to the Jury.

Notwithstanding that fact the Court compelled the Office of the United States District Attorney to offer the alleged confession into evidence, over the objection of the appellant. Thereupon the Trial Court, *sua sponte*, reopened the case, required that a Government witness, a Police Officer before whom the alleged confession was made, again take the stand and detail the making of the confession; ruled that the written statement did not violate the Mallory Rule; and had the statement formally introduced into evidence and read to the Jury.

When this phase of the case was concluded the Jury was instructed and retired to deliberate. Two hours and twenty five minutes after the case had been given to them the Jury sent a note to the Court stating:

"We would like to have Exhibit No. 2,
Cunningham's statement."

The defendant objected to granting this request. The ob-

jection was overruled, and at 3:03 P.M., 33 minutes after the Jury received the written confession the Jury brought in a verdict of manslaughter.

Ergo, it cannot be doubted that the critical and compelling factor as to the verdict of guilty was the weight and sufficiency of the written confession.

STATEMENT OF POINTS

1. It was error for the Trial Court to deny appellant's motion for judgment of acquittal.

2. It was error for the Trial Court to reopen the case.

3. It was error to permit the alleged confession to become a part of the evidence in the case over the objection of appellant's counsel.

ARGUMENT

It was error for the Trial Court to reopen the case.

With respect to Point 1, appellant requests that the Court read page 80, paragraph 1 of the transcript at which point the appellant announces through counsel that he will rest his case.

With respect to this point appellant requests that the Court turn its attention to Reporter's transcript, pages 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112.

The references to the transcript may at first blush seem prolix, but counsel can see no other method for presenting his point.

At this stage of the proceedings the Government has rested -

has completed its case and stands ready to make argument before the Jury; the defendant has made a motion for judgment of acquittal which was denied.

The defendant then rested and was prepared to take his case to the Jury.

The Court has stated (Tr.32)

I have come to the conclusion, + + +, there is enough evidence to justify the jury in drawing an inference that there was a causal connection between the altercation + + + and the bruises + + + as the medical evidence tends to show, eventually led to the death.

It does not seem possible to interpret this language of the Trial Court to mean anything excepting the proposition he had weighed and considered the testimony and evidence and held there was a proper case for the determination of a Jury.

In that state of the case the Assistant United States District Attorney gratuitously observed as follows:

1. A written statement was taken from the defendant after his arrest.
2. A statement was not utilized because the Government desired not to use it.
3. The statement was shown to counsel for defendant.
4. The assistant District Attorney mentioned the proposition because he did not want the record to indicate that the Government had not disclosed to counsel for defendant the existence of the statement.
5. The Government believed the statement to be inadmissible. Thereupon, the Court expressed a lively dissatisfaction with

the conduct of the United States District Attorney not using or failing to use written statements that might be in conflict with the Mallory Rule, and at Tr. 36 the Court says to the District Attorney "What do you want to do about it?" and the District Attorney replied he did not want to do anything about it. The Court then instructs the District Attorney to have the document marked for identification and asked counsel for the defendant if he intended to argue to the Jury respecting the non-use of the document; and counsel for the defendant advised the Court he wanted nothing to do with the document and that he did not want it in evidence.

When the trial resumed the following day the Court advised the Assistant United States District Attorney that the case was giving him much trouble; stated that after the denial of the motion for judgment of acquittal the Court became aware of the existence of the written statement of the defendant; advised the District Attorney he would like to have the confession introduced into evidence and if necessary would grant the Government a days continuance to discuss the advisability of such a procedure with his associates.

Thereafter the Court instructed the Assistant District Attorney to confer with the United States District Attorney relative to placing the confession in evidence, and to obtain a commitment from the United States District Attorney that if the Court admitted the confession into evidence the District Attorney would not confess error in the event of an appeal. Thereupon a recess was taken, so that the assistant could confer with the

United States District Attorney. Thereupon the defendant, through his counsel, advised the Court that this whole proceeding was contrary to his initial and continuing objection. By this time the Assistant United States Attorney had come to the conclusion that the confession was admissible under the Mallory Rule, and so advised the Court.

The recess was terminated and the Assistant United States District Attorney advised the Court that he had informed the United States District Attorney of the Court's desire to have the written confession introduced into evidence and of the Court's desire to defend the use of this evidence through every Court necessary including the Supreme Court, but that the United States District Attorney stated that it was his policy not to offer such statement in evidence; advised the Court that the United States District Attorney would be glad to confer with the Court concerning the matter, and concluded by saying that the United States District Attorney did not desire to have the confession offered in evidence.

Thereupon, the Court advised the Assistant District Attorney that he was going to Order a Judgment of acquittal in view of the fact that the Government's evidence was no more than a scintilla.

Thereupon, the Assistant United States District Attorney asked that he have a further opportunity to confer with the District Attorney, and over the objection of defendant's counsel the Court took another recess, and the Assistant went to the office to confer with his Chief. The Court again stated the

Government's evidence amounted to but a scintilla.

At the end of 15 minutes the Assistant District Attorney returned and announced that his office was ready to offer the confession into evidence and it was offered into evidence over objection.

The Jury was recalled, a Police witness named Buch took the stand and identified the written statement of the defendant as one he had taken. This was done over objection of the Defendant who further requested that the question of the voluntary nature of the document be determined outside the presence of the Jury.

With respect to the support underlying the motion for judgment of acquittal the record discloses that it was originally denied, but that after giving further consideration to the cause during an overnight recess the Court flatly declared that without the introduction into evidence of the alleged confession there was no evidence sufficient to go to the Jury, and that the Court would reverse itself and Order, *sua sponte*, a judgment of acquittal.

When the original motion for judgment of acquittal was denied the facts in evidence and before the Court were precisely the same as those in evidence and before the Court when the Court expressed its determination to dismiss the case unless the United States District Attorney prosecuted the matter according to the directions and fiat of the Trial Court.

II

IT WAS ERROR FOR THE TRIAL COURT TO REOPEN THE CASE

As to the matter of the reopening of the case the adjudicated

cases show that the Trial Court had no authority to direct and order that the United States District Attorney discharge the functions of his executive office as per the command of the judicial officer.

In United States v Brokaw, 50 F. Supp. 100, the Court held as follows:

[1-3] That the United States District Attorney in his capacity as the public prosecutor in his district is clothed with the power and charged with the duties of the Attorney General in England under the common law is generally recognized and supported by the Federal courts. United States v. Thompson, 251 US 407, 40 S. Ct. 289, 64 L. Ed. 333; In re Confiscation Cases, 1868, 7 Wall, 454, 457. 19 L. Ed. 196; Millikin v. Stone, D.C.S.D.N.Y. 1925, 7 F 2d 397; United States v. Stowell, C.C. Mass. 1354, Fed. Cas. No. 16,409; 2 Lord Campbell's, The lives of the Chief Justices of England, 173. In this connection the federal prosecutor acts in an administrative capacity. He is the representative of the public in whom is lodged a discretion to be exercised for the general public welfare, a discretion which is not to be controlled by the courts, or by an interested individual, or by a group of interested individuals who seek redress for wrongs committed against them by use of the criminal process. In United States v. Thompson, *supra*, The Supreme Court held that the Federal courts have no power to control the initiation of criminal proceedings, that being the prerogative and duty of the United States District Attorney. The control of criminal litigation during many stages of a prosecution is a prerogative and power closely akin to the power of initiating a prosecution. With reference to such control The United States District Attorney again derives his power and duty from the common law, and at different stages of a prosecution he exercises that control administratively and may not be required to submit his authority in this respect to the control of a judicial discretion or to the desires of interested individuals or groups of individuals. The practical exercise of this control of criminal proceedings after their initiation lies in the use of the order of *nolle prosequi*.

All of the reported cases and all of the text books flatly state that the judicial arm of the government was trespassing

upon territory where it had no business to tread; and that the executive branch of the government was abandoning a position it had taken solemn oath to maintain.

In 27 CJS p. 673, § 14 (1), it is said:

Generally speaking the prosecuting attorney is charged with the duty of determining when to commence a particular prosecution and when to discontinue it, and has control of criminal proceedings in the trial Court.

In this judicial district in the case of Moses v Kennedy, 219 F. Supp. 752, 1963, Youngdahl, J., said; in an action brought by colored citizens to compel defendant - Attorney General of the United States - to take legal action against named persons for alleged violation of plaintiff's constitutional rights as to civil rights.

[1] First, plaintiffs seek a court order directing the defendants to direct their agents to arrest, cause to be imprisoned, and institute criminal proceedings against "those state and local law enforcement officials and any other persons, public or private, responsible for the deprivation of plaintiff's rights+ + +" both in the past and in the future. Such actions on the part of the defendants, however, are clearly discretionary, and decisions respecting such actions are committed to the executive branch of the Government, not to the courts. See the Confiscation Cases, 74 U.S. (7 Wall) 454, 19 L Ed. 196 (1868); Goldberg v Hoffman, 225 F 2d 463, (7th Cir. 1955); United States v Woody, 2 F 2d 262 (D.C. Mont. 1924; United States v Brokaw, 60 F Supp. 100 (D.C. Ill. 1945); + + +.

After the original refusal of the trial prosecutor to introduce the document the Court required trial prosecutor to see the United States District Attorney for this District, personally, for the purpose of persuading that executive officer to abandon his own legal position in the matter and adopt that of the trial judge; and when it was reported to him the United

States District Attorney continued to be against offering the confession into evidence the trial court sent the trial assistant a second time - under threat of summary dismissal of the cause - to the United States District Attorney in order to accomplish the desire of the trial court -- and this time the United States District Attorney capitulated to the terms and demands of the trial court and abdicated his powers, authorities, and functions to the use and desire of the judicial officer.

And this, not because the chief prosecutor believed the step he was taking was required by, or in the interest of a fair trial under due process, but because he had decided to permit the trial court to have his own way in the matter.

His official duty not to utilize evidence he deemed improper was ignored.

Aside from any consideration of the Mallory Rule the method employed by the Trial Court in bringing the instant confession to the attention of the jury clearly establishes a violation of defendant's right to a fair trial under due process of law.

The transcript and record clearly establishes:

1. The prosecutor did not offer the confession because in his own language he deemed it inadmissible - evidence barred under the applicable decisions of this Court and the Supreme Court of the United States.

2. Defense counsel at all times opposed the use of the confession and advised the Court counsel had as one reason for advising defendant not to take the stand the fear that on cross examination defendant might be interrogated with respect to the confession.

3. Notwithstanding the Court first learned of the existence of the confession after both sides had rested the Court threatened to enter a judgment of acquittal unless the government offered the confession into evidence.

III

IT WAS ERROR TO PERMIT THE ALLEGED CONFESSION TO BECOME A PART OF THE EVIDENCE IN THE CASE OVER THE OBJECTION OF APPELLANT'S COUNSEL.

In connection with this point appellant desires the Court to read pages 113-123; 125-128; 130, 131; 133-142; and 202 of the transcript.

At page 113 counsel for appellant asked that the testimony relative to the admissability of the statement be taken with the jury absent, and on page 114 the Court refused to rule upon the motion, but nonetheless permitted the Government witness to testify fully with respect to the confession.

The record reveals that on November 24, 1963, at approximately 3:55 P.M. the appellant was arrested. It was Sunday; that he was taken to the Homicide Squad; that within 10 minutes of his arrival the Police commenced the taking of a statement; that the statement was completed at 5:02 P.M.; that he was not taken before a committing Magistrate; that he was taken to the Court of General Sessions for the District of Columbia on November 25, 1963; that at the Homicide Squad room appellant was "informed of his rights and so on" (Tr. 118); and over objection the witness on the stand testified from notes made by a Police officer who had worked on the case and who was not in Court (Tr. 121); and (Tr. 122) the confession was then offered and the

Court excused the Jury so that the cross examination of the Government witness could be conducted in their absence. On cross examination the witness testified that when the appellant was arrested the witness was accompanied by two other Police Officers; absent from Court; whose whereabouts were to the witness unknown.

That no effort was made to contact any committing Magistrate; that an Assistant U. S. Attorney had been contacted by another Officer; absent from the Court; that the witness advised the appellant of his constitutional right by stating any statement he gave could be used against him; that he did not advise appellant he had a right not to make a statement; that (Tr.128) "I am no judge, I can't advise a man of his constitutional rights completely. That is the form that we use and this is what I told him"; that no effort was made to determine the possible availability of a Magistrate; that the Assistant District Attorney earlier mentioned was Joseph Lowther, and that the witness had no knowledge of what advice the Police Officer who spoke to Assistant District Attorney Lother received; that the defendant was not advised that he might contact friends or relatives or use a telephone because he had not specifically made such a request and (Tr. 131) "+ + + it is not my job to do that"; that he probably had an opportunity to use the phone when brought from the squad room to the cell block after he had signed the written statement.

Thereupon counsel for the defendant renewed his objection to the statement upon the basis that it contravened the specific commands of this Court in the Mallory case.

Thereupon, the Assistant U. S. District Attorney read the statement to the Jury and both sides again rested with the Court again denying the motion for judgment of acquittal.

At 12:05 P.M. the Jury retired to deliberate; at 2:30 P.M. they asked that the Court send to them the written statement which was done over the objection of the appellant and at 3:03 P.M. the Jury brought in the verdict of guilty of manslaughter.

Here, and with startling candor, the only witness testifying relative to the written statement frankly and unequivocally advised the Trial Court that he had paid lip service to the Mallory Rule and had gone through with a farcical effort to show the Mallory Rule had been observed.

Rule 5 of the Rules of Criminal Procedure does not say a person arrested shall be taken without unnecessary delay before the nearest available commissioner; that a complaint be filed forthwith; and that the Commissioner shall, instanter, advise the prisoner of his rights to have counsel, a preliminary examination with right to remain silent, and the right to have reasonable time and opportunity to consult counsel ~~not~~ unless the prisoner is arrested on a Sunday or upon a Holiday nor that in such an event Rule 5 of the Rules of Criminal Procedure be repealed by act of the arresting Officer. In Killough v. U. S. 315 F 2d. 241, 114 U.S. App. D.C. 305, this Court stated in part:

[1] + + + The public trial guaranteed by the Constitution with counsel, jury and court, after indictment, would be hardly more than a form for validation of what had already been accomplished invalidly + + +;

in the event the defendant was compelled to stand trial in a

case wherein the illegal confession of guilt was given to the Jury.

Continuing in the same case this Court said:

[2,3] + + + To turn the law into a means of obtaining confessions by violating constitutional and statutory safeguards would in the end cause greater loss than gain, and would encourage deterioration in methods of detection.

The insistent determination of the local police to obtain written confessions from accused persons by manners and methods condemned by the Supreme Court; this Court; and by the Constitution and the Rules of Criminal Procedure has reached a stage where lengthy recitation of applicable cases will serve no usefull purpose.

It is not the purpose of this brief writer to be unappreciative of the services rendered by Police nor of the dangers they daily encounter in behalf of the public; but as to this phase of law enforcement this Court will take judicial notice of the fact that the Superintendent of this Police Department has aggressively and persistently over a period of years through the medium of the television, the radio, the press and public appearances proclaimed his dissatisfaction with the Mallory Rule, and expressed a determination to avoid as far as possible its limitation upon the police. It would be folly to suppose that his subordinates would follow a course contrary to his wishes; so that what confronts this Judicial District is a never ending contest between those who disagree with Mallory and those who regard it as the law in this Judicial District.

Police will not cease to take statements in violation of

the legal principal involved unless and until some method is devised for persuading them not to act in both executive and judicial capacities.

The instant statement was taken in clear violation of the rules of criminal procedure and of the doctrine set forth in the Mallory Case.

CONCLUSION

This trial is probably one of the most unique and notwithstanding that with the exception of the Trial Judge the active participants were people of no great prominence, ~~and~~ startling in the history of the local jurisprudence. It is difficult to find any mention in the adjudicated cases of similar coercion by a Trial Judge practiced upon a vacillating District Attorney.

The hard fact of the matter is that while the trial Judge and the District Attorney were jockeying about in support of their respective contentions and beliefs relative to admissibility of written statements, the jury, the defendant and his counsel, were relegated to the status of interested spectators having no concern nor any interest to be protected respecting the admission of the disputed document.

This case should be reversed.

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CERTIFICATE OF SERVICE

I certify that on this 9th day of July, 1964, I deposited copy of the foregoing brief in the Office of the U. S. Attorney for the District of Columbia, 3rd floor U.S. District Court House.

T. Emmett McKenzie
T. Emmett McKenzie

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA ~~Circuit~~ Court of Appeals
for the District of Columbia Circuit

— FILED AUG 13 1964

No. 18,634

Nathan J. Paulson
CLERK

WILLIE CUNNINGHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

JOEL D. BLACKWELL,
FRANK Q. NEBEKER,
Assistant United States Attorneys.

QUESTIONS PRESENTED

- 1) Whether prompt post-arrest reduction to writing of pre-arrest oral admissions renders the written statement inadmissible under decisions enforcing Rule 5(a), F. R. Cr. P.?
- 2) If inadmissible was not use of the written statement harmless error under Rule 52(a), F. R. Cr. P. since it added nothing to what was clearly admissible in evidence in even greater detail?

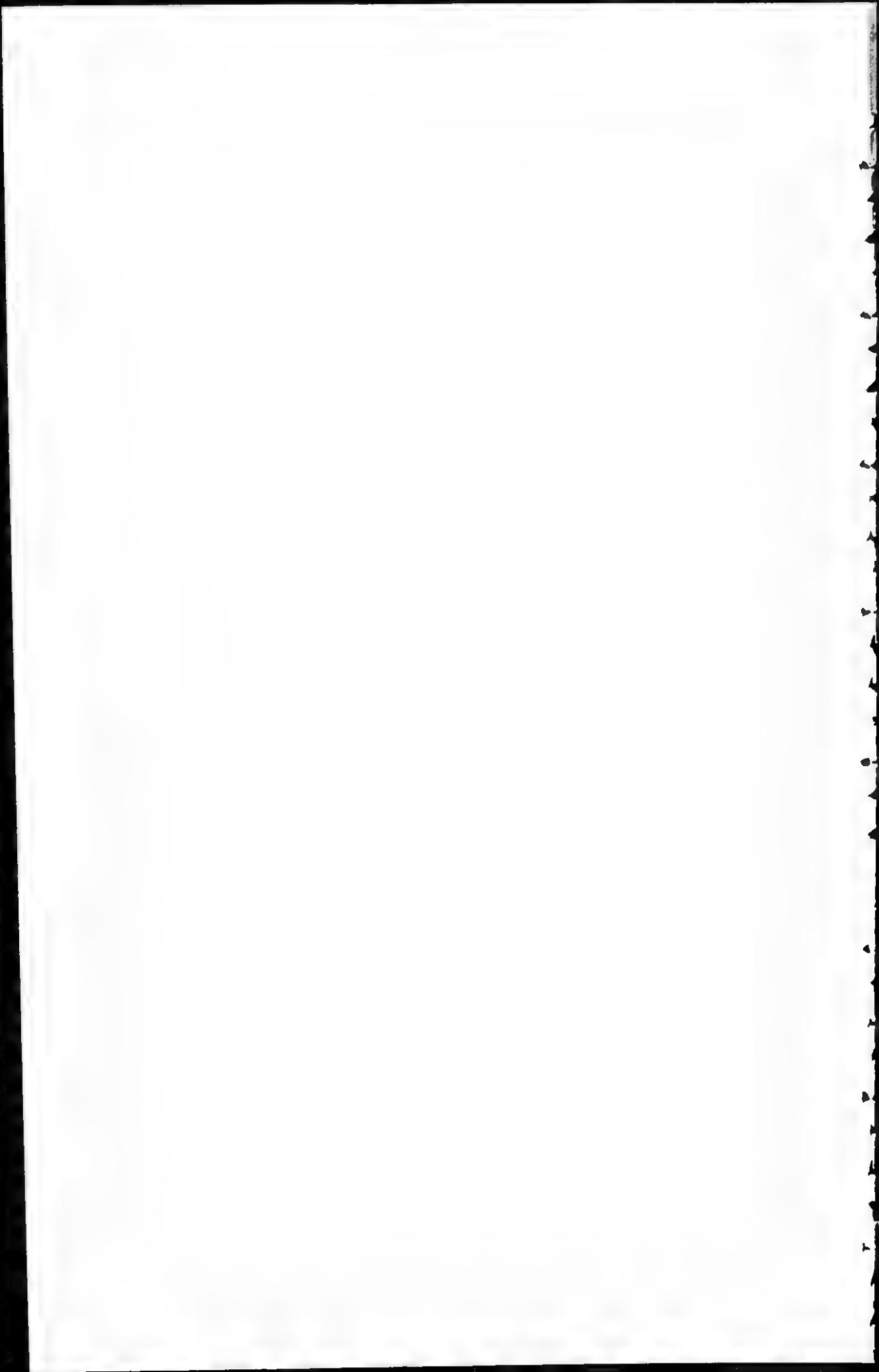
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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,634

WILLIE CUNNINGHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This appeal involves whether the admission into evidence of a signed typewritten admission of the appellant warrants reversal and a new trial. Appellant was indicted for second degree murder, convicted of manslaughter and sentenced to a term of imprisonment of from three years and four months to ten years.

The appellant killed his wife on November 22, 1963. He kicked her to death wearing heavy laborer's shoes (Tr. 38).

The testimony of Dr. Mann, Deputy Coroner (Tr. 12 et seq.), and Dr. Whelton, Coroner for the District of

Columbia (Tr. 61 et seq.) established that appellant's wife died of fat embolism (Tr. 17). The condition of the victim indicated she had been severely beaten. There were deep massive bruises in the vicinity of the buttocks and upper legs. These bruises extended to a depth of two to three inches (Tr. 16 and 63). They were so severe that the fatty tissue beneath the skin had been pulverized or made semi-liquid (Tr. 16, 70). This liquified tissue was then absorbed into the blood stream and circulated through the body. Upon its arrival in a vital organ the fat blocked the fine circulatory system, disrupted the function of the organ and thereby brought about death through fat embolism (Tr. 16-19, 70-72).¹

The facts surrounding the victim's death were discovered in the following way. Officer Newville, a precinct officer, responded to a radio run at appellant's home address on the evening of November 23, 1963. He responded to a report for an unconscious person. (Tr. 27-28.) Upon his arrival in the appellant's bedroom he discovered the victim lying across the bed. She was cold and rather stiff. (Tr. 28.) At that time he conversed with the appellant in an effort to find out what could be discovered regarding the dead woman.

"The defendant stated that the lady was Jessie Young, that she was his common-law wife. I asked him what had happened and he said that about ten minutes prior to our arrival that Jessie had exclaimed, 'Oh, Willie, I am going to die,' and collapsed to the floor. He at that time placed her in the bed and had one of the neighbors call the police.

"Upon interviewing the defendant further, he stated that the night before that he had an altercation with Jessie and they had fought and he had knocked her to the ground, knocked her to the floor, and struck her several times." (Tr. 30.)

¹ The victim had apparently received numerous cuts and wounds in the vicinity of the head and a fractured arm (Tr. 15-16). As has been observed, however, the cause of death was brought about by the massive bruising, primarily in the area of the buttocks and legs.

At this point detectives from the Homicide Squad arrived and Officer Newville gave them the information which he had received.

The Homicide Squad Detectives, Crook (Tr. 31) and Buch (Tr. 49), began their investigation by also inquiring of appellant regarding the circumstances of the woman's death. Appellant was then asked:

"further questions about her medical history, asked . . . if she had ever been in any hospital, . . .

* * * * *

And we asked him—one of our questions on all these deaths, has she ever been in any accidents, has she ever had any falls, or has she ever been assaulted or been injured in any way. At that time he stated that he had struck her the night before, on Friday.

He stated that he came home that evening, that was November 22nd, and she had been drinking whiskey and wine. And he stated that he got angry about this and an argument ensued. And he said he struck her with his fist and knocked her to the floor. He then kicked her about the buttocks and back with his feet. He stated that he reached down, picked her up, and he demonstrated at this time how he did it, and struck her one more time, knocking her back to the floor.

* * * * *

He had workman's type shoes that [were] ankle high. [They were] a heavy type laborer's shoe. [They were] leather with rubber soles. (Tr. 36-38).

Detective Buch's testimony was to the same effect:

He stated that she had not been under the care of a doctor; she had been in the hospital one time previous. Also one of our usual questions that we ask a person on a death, has the person received any injuries or falls.

* * * * *

At this time he told Detective Crook and myself, who was standing right next to him, that he did have an altercation with this woman the night before, which

would be Friday, the 22nd. He stated that he came home; she was laying on the couch in the front room, no clothes on, was drunk, a man by the name of Morgan was standing in the doorway when he walked in. He had an argument with her about her fooling around Morgan. Then he struck her with his hand, knocked her down, then he said he kicked her in the buttocks. This wasn't the exact words that he used but the substance; it means the same thing. He stated that he went out then. Now on this particular night, on the 23rd, he stated prior to our arrival, prior to calling the police, that she became ill. He placed her in the bed and she told him that she was going to die. He said that was a short time prior to our arrival. And that was about it at that time. (Tr. 51-52)

The District of Columbia Coroner was then notified and the body was taken to the hospital. Detectives Crook and Buch returned to the Precinct. (Tr. 33.) Appellant was not then arrested. His arrest did not occur until the following day, November 24. (Tr. 35, 43, 52 and 116.)

The court denied appellant's motion for judgment of acquittal (Tr. 82). Discussion ensued regarding the advisability of introducing into evidence a written statement taken from the defendant immediately upon his arrival at Homicide Headquarters after his arrest (Tr. 82-108). The court, advised that the prosecution had concluded not to use this written statement, stated:

"I understand. I will tell you this: I am going to order a judgment of acquittal."

The court seemed unimpressed with the testimony regarding the oral admissions (Tr. 108). In view of the proposed ruling the Government reconsidered its position and determined to use as evidence the signed typewritten admission (Tr. 111).² Accordingly, the trial court allowed

² The decision for the prosecution was whether it should stand by and allow a judgment of acquittal to be entered, thus depriving the Government and society of its opportunity for jury consideration of the facts—no appeal would lay from such a final de-

the Government to reopen its case with the testimony of Detective Buch who identified the written statement and testified concerning the manner in which it was obtained immediately after the appellant's arrest.

Upon arresting appellant at his home on November 24, at about 3:55 p.m., the day after his oral admissions, he was taken directly to the Homicide Squad. He arrived at approximately 4:15 p.m. (Tr. 115-116.) Within ten minutes, the written statement was begun and it was completed at 5:02 p.m., 37 minutes later (Tr. 116-117). After completion of the statement the appellant was then booked and processed through the Identification Bureau. (Tr. 131.) The written statement was then read to the jury (Tr. 135-41).*

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2403, provides:

Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

Title 22, District of Columbia Code, Section 2405, provides:

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

Rule 52(a), Federal Rules of Criminal Procedure, provides:

cision—or whether to offer into evidence a written admission containing no incriminating material not already testified to and clearly admissible. At worst the latter course would result in a new trial. Certainly, under these circumstances justice would deplore the irrevocable release of the appellant by the District Court. See Appellant's br. p. 10.

* The evidence was clearly sufficient, and further discussion of the point is not warranted. See Appellant's brief p. 3, Statement of Points No. 1.

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

SUMMARY OF ARGUMENT

The use of appellant's post-arrest written statement of his pre-arrest admissions was not error. Prompt reduction to writing, after arrest, of clearly admissible pre-arrest oral admissions does not violate the proscription of the *Mallory* doctrine. So holds *Bailey v. United States*, — U.S. App. D.C. —, 328 F.2d 542 (1964). In any event the written statement contained nothing not already in evidence and its use as evidence was harmless. See Rule 52(a), F. R. Crim. P.

ARGUMENT

The written statement was clearly admissible but in any event its use as evidence was harmless.

(See Tr. 27, 28, 30, 33, 35, 36-38, 43, 51, 52, 82-108, 111, 115-117, 131, 135-141).

Prompt reduction to writing of pre-arrest admissions cannot and ought not to be viewed in the same way as post-arrest initial interrogation. Cf. *Perry v. United States*, No. 17846, decided July 31, 1964. The same considerations do not prevail. In the former situation the police already lawfully have their evidence. All that need be done is to permanently record it in order that subsequent testimony regarding it will be accurate. This is in the interest of both parties. In post-arrest initial interrogation evidence not already possessed is obtained. It is this situation which some judicial authority thinks should be passe in law enforcement. It is to this end that the judicial mantle extends ever more into the investigative sphere.

Accordingly, appellee does not agree that the written statement is inadmissible (Tr. 106). Apparently no case has dealt with the propriety of reducing to writing, im-

mediately after arrest, admissions such as those orally made here the day before the arrest. However, the law of this Circuit does reflect a policy of encouraging reduction to writing of oral statements. See *Muschette v. United States*, 116 U.S. App. D.C. 239, 322 F.2d 989, vacated and remanded on other grounds, 12 L.ed 2d 1039 (1964). *Bailey v. United States*, — U.S. App. D.C. —, 328 F.2d 542 (1964). As in *Bailey* it can be said appellant "signed the typed statement as soon as it could be prepared after his arrival at the Homicide Office. This was proper procedure and not unlawful delay." *Id.* at 546. In *Bailey* the oral statement was made to the arresting officer immediately before Bailey's arrest, when he surrendered himself and explained why he was doing so. Here the oral statements were made the day before the arrest when appellant was not a suspect and no crime appeared connected with the death. *A fortiorari* the law of this Circuit renders admissible the instant written statement.

However, use of the written statement added nothing to the Government's case⁴ and accordingly was not prejudicial to appellant. This can be best illustrated graphically. The following columns unequivocally demonstrate that [REDACTED] thing contained in the written statement was [REDACTED] already in evidence by virtue of appellant's pre-arrest admissions.

⁴ It took nothing from the defense (See *Elsie Jones v. United States, infra*) since there was no defense case.

ORAL ADMISSIONS

Officer Newville

* * * *

"Upon interviewing the defendant further, he stated that the night before that he had an altercation with Jessie and they had fought and he had knocked her to the ground, knocked her to the floor, and struck her several times." (Tr. 30.)

Detective Buch

* * * *

"At this time he told Detective Crook and myself, who was standing right next to him, that he did have an altercation with this woman the night before, which would be Friday, the 22nd. He stated that he came home; she was laying on the couch in the front room, no clothes on, was drunk, a man by the name of Morgan was standing in the doorway when he walked in. He had an argument with her about her fooling around Morgan. Then he struck her with his hand, knocked her down, then he said he kicked her in the buttocks. This wasn't the exact words that he used but the substance; it means the same thing. He stated that he went out then. Now on this particular night, on the 23rd, he stated prior to our arrival, prior to calling the police, that she became ill. He placed her in the bed and she told him that she was going to die. He said that was a short time prior to our arrival. And that was about it at that time." (Tr. 51-52).

Detective Crook

* * * *

"And we asked him—one of our questions on all these deaths, has she ever been in any accidents, has she ever had any falls, or has she ever been assaulted or been injured in any

WRITTEN ADMISSION

* * * *

Q. What happened when you [earlier] came in the house and Morgan was knocking on the door as you stated?

A. Morgan, when he saw me, left and said, he would see me later. I then said, well I will be goddam. I then said, I was going to get me a drink. Jessie got up off the couch and said, I wasn't going anywhere. I then shoved her back and she fell over the chair I had stumbled over. After she fell, I smacked her in the face and she got then and I left (sic.)

Q. How many times did you strike or kick Jessie Boozer Young while she was lying [sic.] on the floor?

A. None. I kicked at her now, understand me good, sir.

* * * *

Q. You told me last night (Saturday, November 23, 1963) that you kicked Jessie Boozer Young in the buttocks as she was lying [sic.] on the floor, I ask you now if this is true?

A. If I told you this, it is probably true.

Q. I ask you again if you told me this?

A. Yes, I told you that.

* * * *

Q. When you came home did you accuse Jessie Boozer Young of fooling around with Russell Morgan?

A. Yeah.

* * * *

way. At that time he stated that he had struck her the night before, on Friday.

* * * *

"He stated that he came home that evening, that was November 22nd, and she had been drinking whiskey and wine. An he stated that he got angry about this and an argument ensued. And he said he struck her with his fist and knocked her to the floor. He then kicked her about the buttocks and back with his feet. He stated that he reached down, picked her up, and he demonstrated at this time how he did it, and struck her one more time, knocking her back to the floor.

* * * *

"He stated that he was wearing the same clothes as he was wearing the night we were talking to him.

* * * *

"He had workman's type shoes that was ankle high. It was a heavy type laborer's shoe. It was leather with rubber soles." (Tr. 36-38).

It is thus apparent that the mandate of Rule 52(a), Federal Rules of Criminal Procedure requires this Court to disregard any possible error connected with the use of the written statement. *Porter v. United States*, 103 U.S. App. D.C. 385, 392-3, 258 F.2d 685, 692-3 (1958). Cf. *Haines v. United States*, 188 F.2d 546, 550 (9th Cir. 1951), cert. denied, 342 U.S. 884, rehearing denied, 342 U.S. 911; *McIntosh v. United States*, 176 F.2d 514, 516 (8th Cir. 1949). Thus it may be said of the instant case "in this case nothing appeared that had not already been told by timely statements . . . It is inconceivable . . . that such testimony could harmfully affect appellant's rights." *Porter v. United States, supra*, at 393.⁵

⁵ Appellee is not unmindful of the dicta contained in Judge Wright's opinion in *Elsie Jones v. United States*, 113 U.S. App. D.C. 256 at 258, 307 F.2d 397 at 399 (1962). We note, however, that in the *Jones* case the Court was dealing with a confession not with

CONCLUSION

Wherefore, appellee respectfully submits that the judgment of the District Court be affirmed.

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an admission. Those comments regarding the prejudicial nature of any confession are mere dicta, for the decision of the court was predicated upon the proposition that the written confession, unlike the oral confession, was significantly different in that the former contained language "calculated to destroy [the] claim of self defense". With reference to the cases cited in footnotes 8 and 9 of the *Jones* opinion, *supra*, appellee submits that they involved questions of a constitutional magnitude not here presented. Where, as here, inadmissibility of a statement might only be predicated upon the supervisory power of the court to require obedience by police to Rule 5(a), (See separate opinion by Senior Circuit Judge Prettyman in *David Jones, et al. v. United States*, No. 17688-92 decided *en banc* July 16, 1964, slip opinion pp. 27-8.), that rationale is not applicable.

